BEFORE THE ARBITRATOR

INDEPENDENT SCHOOL DISTRICT 196 And SUPPORT STAFF ASSOCIATION OF INDEPENDENT SCHOOL DISTRICT 196	BMS Case No. 15 PA No. 0457

APPEARANCES:

Attorneys Jill Coyle and Peter Shaw, on behalf of Independent School District 196.

Attorney Andrew Parker, on behalf of the Support Staff Association of Independent School District 196.

Independent School District 196 and the Support Staff Association of Independent School District 196 (hereinafter referred to as the District and the Association, respectively) are parties to a collective bargaining agreement providing for final and binding arbitration. The undersigned was selected from a panel provided by Minnesota's Bureau of Mediation Services pursuant to said agreement to hear and decide the above-referenced dispute. Hearing was held on March 6, 2015, April 10, 2015, and April 23, 2015 in Rosemount, Minnesota, where the parties were afforded full opportunity to present oral argument, evidence, and testimony. The hearing was not transcribed. The parties filed post-hearing briefs which were exchanged and the record was thereafter closed by June 2, 2015.

Based upon consideration of the record and arguments in their entirety, the undersigned issues the following Award.

ISSUES:

The parties had slightly differing proposed issues. The District proposes:

Did District 196 have just cause to suspend the grievant, Cheryl Ratzlaff, for five days?

The Association proposes:

1) Whether the District had just cause to administer discipline in this case?
2) If not, what is the appropriate remedy?

After consideration of the entire record, the undersigned finds the Association's proposed issues address the dispute more comprehensively and are adopted here.

PERTINENT CONTRACT PROVISIONS

ARTICLE IX
DISCIPLINE

…

Section 2. Progressive Discipline: The parties to this agreement recognize both the concept of progressive discipline and the fact that accelerated actions, including discharge, may be warranted in instances involving severe or repeated misconduct. An employee who has completed the probationary period may be suspended without pay, discharged or disciplined only for just cause.

ARTICLE XXII
GRIEVANCE PROCEDURE

…

Section 9. Arbitration Procedures: …

Subd.5. Decision: The decision of the arbitrator shall be rendered within forty-five days after the close of the hearing.[1]

...

BACKGROUND

Cheryl Ratzlaff, the grievant, worked as a Custodian at Red Pine Elementary for the District from 1994 to 1999 without any performance or disciplinary issues. She then worked for the City of Rosemount as a Custodian from 1999 to 2008, apparently without performance or disciplinary issues. She was then laid off and returned in 2008 to the District at Apple Valley High School as a Custodian.

A May 11, 2009 job performance review memo at Apple Valley High School states in part:

…

> One concern is the fact you have been combining your break times into a one hour break and sleeping in the training room during that one hour. … You must adhere to the authorized break times established by Dave.
>
> On a few occasions you have arrived late for work.

…

[1] The parties stipulated that the time limit for issuing an award as outlined in Subd. 5, Section 9, of Article XXII is waived.

An April 1, 2010 "Summary of 3/23/10 Meeting and Expectations for Future" states in part:

> In the future you are expected to:
>
> - Interact and communicate (both verbally and nonverbally) with coworkers, lead and building chief in a professional, courteous and cooperative manner.
> - Take breaks/lunch at approved times; …
> - Present yourself to work on time each day you are scheduled to work. Follow department procedures for calling in if you are going to be absent or late.
>
> …
>
> - Never have family members or anyone other than approved district custodial staff assist with your custodial duties.
>
> …
>
> This letter is not disciplinary in nature; however, failure to comply with expectations detailed in this letter may result in disciplinary action in the future.

A December 22, 2010 "Documentation of 12/21/10 Meeting and Verbal Warning" states in pertinent part: "… You are expected to interact and communicate with all people whom you may encounter in the building in a professional, respectful, courteous and cooperative manner."

A March 18, 2011 "Notice of Deficiency – Written Warning" states in part:

> **CAUSE FOR DISCIPLINARY ACTION**
>
> …
>
> 1. Reporting late to work on three occasions: 2/15/11, 3/3/11 and 3/10/11
> 2. Not calling in at or prior to your shift start time to inform the lead that you were going to be late.
> 3. Not informing your building chief at the end of your shift that you had been late ….
>
> Continuing work expectations:
>
> - Work and resolve disagreements with other staff in a cooperative manner.
> - Take break/lunch at approved times.
>
> …

A February 16, 2012 "Notice of Deficiency and Suspension" states in part:

> …
>
> **CAUSE FOR DISCIPLINARY ACTION**
>
> The cause for disciplinary action is as follows:
>
> 1. Not performing all assigned job duties to department standards on a consistent basis.
> 2. Using vulgar/inappropriate language and communicating in an unprofessional manner.

You are hereby directed as follows:

1. Perform all assigned job duties to department standards on a consistent basis using proper methods and supplies and following directions of building administrators, the building chief, and the evening lead.

…

DISCIPLINARY ACTION

This letter of Deficiency constitutes a formal written reprimand in this matter and will become a part of your personnel file in District 196. You are hereby suspended without pay for one day as a result of your conduct. …

Your failure to comply with the corrective action or expectations contained in this or past letters, or reoccurrence of similar conduct in the future, will result in further disciplinary action up to and including termination.

…

In early 2012 Ratzlaff applied for a transfer from Apple Valley High School to a custodial position that requires working at Rahncliff Learning Center (RCLC) from 2:00 p.m. to 6:00 p.m. then at Cedar Valley Learning Center (CVLC) from 6:30 p.m. to 10:30 p.m. Ratzlaff was having difficulties with the Apple Valley High School Business Chief. Michael Schwanke, the District's Coordinator of Facilities and Grounds, testified that he generally does not approve transfers if an employee has performance or discipline issues unless the employee has a clean record for five years. However, he testified that he made an exception in this instance and allowed the transfer.

Ratzlaff began the custodial position at CVLC in February 2012. CVLC is an adult learning center and also provides childcare in the children's room during the day. In addition, GED testing is administered at the facility. Kerry Hudgens was Ratzlaff's supervisor until the end of 2012. At the beginning of 2013 Eric Lind became the Program Manager of Adult Basic Education Skills at CVLC. He supervises staff at CVLC, including Ratzlaff.

Ratzlaff was responsible for cleaning the entire three-level building. She has a garbage can on rollers from which her cleaning tools and supplies are hung.

Because of concerns in her performance, Ratzlaff received a December 20, 2012 "Job Performance Memorandum" which states in part:

…

- RCLC main hallway carpet had an odor and appeared dirty.
- RCLC and CVLC employee lounge floor and tables were dirty
- CVLC carpet was dusty under the desks
- CVLC children's room floor under hand washing sink was dirty and dusty
- CVLC lower level restroom floor behind toilets is not cleaned

...

A meeting was held with you, Cathy Koering, and me at the CVLC on December 18, 2012. I discussed … my observations as mentioned above. … You mentioned that you are going through some tough times and that you are trying.

…

As a custodian you are required to:

1. Arrive to assigned location on time and stay until your shift is completed.
2. Contact the Facilities Office when you are absent or have a change in your schedule.
3. Communicate in advance with your Supervisor and Facilities when you need to take vacation.
4. Perform all assigned jobs to department standards on a consistent basis.
5. Communicate with staff members on a consistent basis.

…

This memorandum is not disciplinary in nature; however, failure to follow the required actions detailed in this letter or continued performance concerns may result in disciplinary action. …

Ratzlaff's boyfriend had recently passed away

A February 5, 2013 "Letter of Direction" to Ratzlaff states in part:

…It was noted that your punctuality has improved and you are reporting absences as directed since the December 18, 2013 meeting.

…

As a result of these concerns, expectations for future job performance and conduct are detailed below. You are hereby directed as follows:

1. Arrive to assigned work location on time and stay until your shift is completed.
2. Contact the ABE Program Manager and Facilities office when you are absent or have a change in your schedule.
3. Communicate in advance with your ABE Program Manager and Facilities office when you need to take vacation.
4. Perform all assigned jobs to department standards on a consistent basis.
5. Interact and communicate in a professional and courteous manner with staff members and students.
6. If you have concerns, share them in a respectful and courteous manner with the building or facilities administrator; do not discuss them with staff or students.
7. Family members, including your child, should not be in the workplace unless they are participating in district activities.

Eric Lind and I will have monthly reviews with you to monitor your job performance and conduct.

> This letter is not disciplinary in nature; however failure to comply with the expectations detailed in this letter may result in disciplinary action in the future. I also caution you not to engage in any retaliation toward staff members or students from whom we have obtained information and that any such retaliation would constitute grounds for disciplinary action.

Between January 2013 and May 2014 management met with Ratzlaff on an approximately monthly basis to review her work performance. During that time she did not receive any written recommended corrections to her job performance nor any disciplinary actions.

In 2013 through the first half of 2014 Ratzlaff applied for transfers on four different occasions so that she could work days in order to be at home more when her daughter was at home. She was having custodial issues regarding her daughter. Each time her transfer request was denied because of performance and discipline issues, according to Schwanke.

A June 11, 2014 "Notice of Deficiency" to Ratzlaff from Lind and Schwanke states in part:

> Chris Pint, Health and Safety Supervisor, Eric and I then conducted a building inspection at Cedar Valley Learning Center on May 5th at 8 am and at Rahncliff Learning Center on May 7th at 7:45 am. The cleanliness of these buildings did not meet department standards.
>
> …
>
> On Friday, May 30, 2014 we met to discuss concerns regarding your conduct and performance. … We also shared concerns with your occasional non-respectful and unprofessional behavior when communicating with us and teaching staff.
>
> …
>
> We met again with you on June 6, 2014 to further review the items of concern from our inspections, including reviewing pictures of some of the deficiencies at RCLCF, and for you to show us the current status of cleaning at the RCLC. The building did look much cleaner when toured on June 6th. At that meeting you also shared letters of recommendation you had requested from staff at both buildings and various notes of appreciation you had received.

CAUSE FOR DISCIPLINARY ACTION

1. Not performing all assigned job duties to department standards on a consistent basis.
2. Occasionally being disrespectful and unprofessional in your communication with us and building staff.

CORRECTIVE ACTION

You are hereby directed as follows:

1. Continue to follow all previous directives (from letter dated 2/5/13).
2. Perform all assigned job duties to department standards on a consistent basis using proper methods and supplies and follow directions of building and district administrators.

3. Communicate with others in the workplace in a courteous and respectful manner.
4. Perform additional duties as scheduled and/or requested in an efficient and timely manner.

DISCIPLINARY ACTION

This Letter of Deficiency constitutes a formal written reprimand. …

We caution you that you may not engage in any retaliation toward staff members or others who may have provided information in this matter. Any retaliation by you will constitute grounds for disciplinary action.

An August 20, 2014 "Notice of Deficiency and Suspension" from Lind and Schwanke states in part:

- On July 22nd you were working at RCLC and left a voicemail message for Eric Lind at 2:59 pm stating that you were going to take 4 hours of vacation during your shift due to the showing of the building and that you would then return to RCLC to finish cleaning and then would go to CVLC. Eric called you at 3:15 pm and said he preferred you didn't take vacation, as the showing shouldn't impact your cleaning too much, and asked you to remain at RCLC until the showing was over to ensure the building was secure. You responded that the secretary or lead teacher could lock up and that regardless you were taking 4 hours of vacation. You ended the call before Eric could respond. The next day there was an absence slip indicating a half day of personal leave for 7/22/14. At the meeting you acknowledged the above conversation and said you were under duress from all of these meetings and that you had a personal reason you needed to leave that you did not want to share.
- On July 23, Eric called you at 12:55 pm, approximately one hour prior to your shift start time, to let you know he had scheduled a meeting with you regarding your absence the prior day and asking if you would have Mike O'Shaugnessy attend as your association representative. Eric reports you said yes (you would like Mike to attend) and then said in an angry tone of voice that you had the right to take personal leave on the 7/22 and that you were upset he was setting up a meeting. You then stated you had every right to take a personal leave day that day (7/23) as well and that you were going to and you ended the call before Eric could respond. Shortly after you left Eric a voicemail reiterating that you were taking a full personal leave day …. At the meeting on July 29th you stated that you thought you could take personal leave at any time without prior approval. …
- … You didn't recall using the computer for anything personal and said you weren't on it long, maybe 15 minutes. When told that a computer usage report showed almost constant activity on that computer from 7:31 pm to 9:18 pm (1 hour and 47 minutes) and asked if you had been on the computer that long, you first said you didn't recall being on it that long but then said you probably were since you were at the desk waiting for staff to leave. …

CAUSE FOR DISCIPLINARY ACTION

1. Your communication with your supervisor was curt, disrespectful and unacceptable.
2. The reason you communicated to your supervisor for taking time off on July 22 via voicemail and I a phone call that day was not truthful.
3. You were insubordinate by disregarding a supervisor's instruction to remain at work on July 22.
4. You misused work time on multiple occasions in July by your use of the CVLC computer for excessive periods of time and for non-work related purposes.
5. You failed to comply with prior directives.

CORRECTIVE ACTION

1. Report reasons for absences truthfully and seek permission for days off peer the provisions in the working agreement. If you are calling during day hours, call the person, not the voicemail.
2. Communicate a professional, courteous and respectful manner in all interactions, including phone calls.
3. Use of District computers shall be limited to work relevant activities only, ….
4. Perform custodial duties at all times during your assigned work hours. …
5. Meet monthly with Eric Lind and Chris Pint to review completion of your job duties/cleaning.

You are also expected to continue to comply with the previous directives …

Ratzlaff's daughter was taken by ambulance to the hospital on July 22, 2014 for surgery; she remained in the hospital the rest of that week. Ratzlaff testified that she was in a state of shock when she left the voicemail message on July 22nd advising that she needed to take leave. Ratzlaff credibly testified that she was not comfortable at that point sharing with management her daughter's medical situation.

Ratzlaff testified that on September 23, 2014 her dog did not go to the bathroom when she went home between her RCLC and CVLC shifts so she brought her dog with her and initially left it in her car.

Kathryn Lindner is a receptionist at CVLC. Her desk is on the ground floor at the front of the building. Tuesday evenings Lindner's schedule overlapped Ratzlaff's. Part of Lindner's responsibilities include administering GED tests.

Lindner testified that on that evening a Somali American woman was taking a GED in the corner conference room that is close to her reception desk. The woman asked Lindner if she heard a noise. Lindner testified that she heard what sounded like a baby crying. She testified that she then tracked down the noise, reaching the Early Children's room, a large room that is in the back of that floor. She opened

the door and "a little dog met me." She immediately closed the door. She testified that occurred sometime before the 7:15 p.m. break and after 6:00 p.m. Linder then walked toward the bathrooms and saw Ratzlaff, which was the first time Lindner saw her that night. Linder testified it was unusual to see a dog in the building. Linder asked her if that was her dog and she responded that it was.

Sometime after 6:30 p.m. and before the 7:15 p.m. break, Linder testified that she heard what sounded like a radio coming from the Early Children's room. She opened the door to the room, called out her name, heard a toilet flush, and saw that she was on her phone. She did not want to disturb Ratzlaff so she closed the door and left.

Later, according to Lindner, the dog came up to Lindner's desk. Lindner petted the dog then Ratzlaff came and brought the dog back to the Early Childhood room.

At 8:30 p.m. when all students and staff, except for Lindner, leave the building, Lindner went back to the Early Childhood room to tell Ratzlaff she was leaving. Ratzlaff's dog was in that room. She saw Ratzlaff on her phone, and Ratzlaff ended that call. Ratzlaff testified that her dog was in the Children's room for a total of approximately one hour.

Linder testified that the cleaning supplies barrel was outside of the Early Childhood room until she left. She testified that she had walked by the room two to three other times that evening when the cart was still there. Lindner testified she believes Ratzlaff typically cleans that room in twenty to thirty minutes. Lindner testified she usually sees Ratzlaff going about her cleaning duties during Tuesday evenings.

Ratzlaff testified it takes forty to sixty minutes to clean the Children's room, that she cleaned that room completely and left that room about three times while cleaning there. Moreover, she testified that she cleaned the entire building that night.

The next day Lindner told Rosalyn Habek, the ABE Secretary, the following morning about Ratzlaff taking a dog to work. Linder told Lind when he arrived at work that morning. Lind had a previously scheduled performance review meeting with Ratzlaff that day to review her cleaning performance. Her cleaning performance was considered good. However, at the end of the meeting he

brought up the issue of taking a dog to work and that there would be another meeting to address that situation. Lind testified that he told Ratzlaff the meeting about the dog would be the next day, September 25th; however, Ratzlaff testified he did not tell her when that meeting would be scheduled.

Ratzlaff then went up to Lindner, who was in a corner office, and, according to Ratzlaff and Lindner, Ratzlaff asked "Why did you tell Eric about the dog?" Lindner testified that it was said in an angry tone. Ratzlaff testified that she was still crying. Ratzlaff testified that Lindner responded in an angry tone, "You're the one that brought the stupid dog." Ratzlaff then walked away. Habek, who happened to be a few feet away, testified that Ratzlaff stated to Lindner "I thought you were my friend. Why did you tell on me?" in a slightly stern or angry tone. Ratzlaff testified that she was taken aback because she had a friendly interaction with her dog the night before. Ratzlaff then left the building through the back door.

Between around 2:30 p.m. and 3:00 p.m. Ratzlaff then called Anita Simon, Grounds and Facility Secretary, to advise her that she would be taking leave and that it would be necessary to find someone to fill in for her. Ratzlaff then called Lind to advise him she would be leaving. She did not advise Lind that she was ill. Lind responded, "OK." Ratzlaff was crying at the time.

Lind drafted his notes of what he was told occurred the night before, his meeting with Ratzlaff, and her advising him that afternoon that she needed to take leave. Those notes state in part:

> Between 6:30 pm and 6:45 pm on September 23, a new ABE student and an ABE staff member heard a dog whining on the main floor at CVLC. They found a dog in the children's room. It was not tied up.
>
> Soon after finding the dog, the ABE staff member asked Cheryl if that was her dog. Cheryl said it was her dog and that she brought the dog to work because it had not had its two, hour-long walks or relieved itself yet.
>
> At the 7:15 break time, the ABE staff member noticed Cheryl's cart and mop and bucket in the hallway in front of the children's room, she saw the dog and called for Cheryl, but she didn't respond. She thought she heard a radio or maybe someone on the phone, and then heard someone in the bathroom.
>
> Between 7:15 and 8:30 pm, the ABE staff member did not hear or see Cheryl leave the room or hear any activity such as vacuuming in the children's room. She walked by the room a couple of times and didn't see any activity in the room and the cleaning supplies remained in the hallway.

> At 8:30 pm, the ABE staff member looked in the room again to check if Cheryl was OK and to tell her she was leaving. Cheryl was on her cell phone in the room and stopped talking on the phone a minute to say goodbye to the ABE employee.
>
> …
>
> On Wed., Sept. 24 I told Cheryl about a meeting on Thursday in which we would address the issue of bringing the dog to work. Cheryl said she did bring in the dog and that she needed to because of an emergency.
>
> Between 2:30 and 3:00 pm on Wed., Sept. 24, Cheryl confronted an ABE staff member after I told Cheryl about the meeting on Thurs. concerning the dog. In an angry tone, she said, "Why did you tell Eric about the dog?" the ABE staff member responded that a student had heard the dog and that she was concerned. Cheryl angrily walked away. The staff member and the witness told me about the confrontation.
>
> Shortly afterwards, sometime between 2:30 and 3:00 pm, Cheryl called me from the custodial office at CVLC and told me a (sic.) she called Anita at facilities to set up a floater and that she had to leave. She was in tears. I told her OK. She did not give a reason over the phone and when I called Anita, I found out that she hadn't given Anita a reason either.

On September 29, 2014 Lind signed a leave request form from Ratzlaff where she indicated she was ill from September 24, 2014 through her full shift on September 25, 2014. The afternoon of September 24, 2014 the grievant was hemorrhaging and had bleeding issues for the previous two weeks. Ratzlaff further testified that she had been "an emotional wreck" for weeks. She went to the doctor on September 25, 2014 and had a hysterectomy on October 21, 2014.

In preparation for the September 30, 2014 meeting Lind typed up questions he planned on asking Ratzlaff. His questions and her responses are memorialized as follows:

1. I understand that you brought your dog to work on Tuesday, September 23, is that correct? Yes

    a. What time period was the dog at work and at which site(s)? *Arrived at CVLC a 6:51 – was dog with her at that time and did she bring dog in building then?* CVLC second half of shift – dog in car for 45 min brought into class after break 7:30
    b. Where did you keep the dog at work? – classroom - ECFE room
    c. Why did you bring your dog to work? - neighbor couldn't help out – dog wouldn't go to the bathroom before work or during her break
    d. What reason did you give an ABE staff member on Tuesday evening for bringing the dog in? *(The ABE staff member reports that Cheryl said her dog hadn't had its normal walks or relieved itself yet that day.)*
    e. It is not acceptable to bring your dog to work for a multiple of reasons. Why did you think you could do so, especially when staff and students were in the

building? (for cultural issues for some of our students, distraction to students and staff, possible allergies) - didn't have a choice

2. How much time that evening did you spend in the children's room? - Brought in dog at 7:30 - trashing around building
   a. It was reported that you were with the dog in the children's room between 7:15 pm and 8:30 pm on Tuesday evening. Were you? … - cleaning
   b. What work did you complete in the children's room during that time? – cleaning

…

3. Did you interact with an ABE staff member after finding out about today's meeting regarding your dog at work?
   a. Why? Wondering why she would make an issue curious why she would
   b. What did you say?
   c. Do you recall the warnings you've been given in the past about confronting staff member who may have provided information? - said Kathy L. yelled at Cheryl - why is she being singled out?

…

5 Did you call Anita Simon and then Eric Lind on Wednesday afternoon 9/24, following the meeting with Eric Lind and Chris Pint … to tell them you needed to leave work and to request a floater from Anita?
   a. Did you give a reason for the absence? sick

7. Do you have regular break times each day? At consistent times? – no
   a. Do you use your cell phone at times outside your lunch or break times? Usually not, no
   b. What is your normal cleaning routine during the evenings at CVLC? … - trying to figure out – cleaning unoccupied …

Management felt that Ratzlaff's request for leave on September 24 was similar to what she was disciplined for when she took leave on July 22, 2014. In both instances they believe she was attempting to avoid a meeting with management.

Lind testified that concerns with a dog in the Children's room include: unsanitary conditions, head dander, distraction to students, Somali American students in buildings are uncomfortable with dogs, and the dog would be a distraction to her work. There is no District policy, written or unwritten, prohibiting taking dogs into school buildings. Ratzlaff had never been told previously not to have a dog at CVLC nor the District's concerns of by having a dog at CVLC. Lind further testified that taking a dog to CVLC was similar to taking her child in to work, for which she had been previously counseled.

Association Vice President Daryl Buecksler, whose job requires District-wide maintenance at all the buildings, testified that over the last few years there were six occasions when he specifically remembers seeing a dog in a District building and other occasions when he saw a dog in a District

building but he does not recall the specifics. At North View, Red Pine, and Rosemount schools he saw a dog in the building when school was not in session but staff were. At the School for Environmental Studies dogs were brought to the school for education purposes. At Cedar Park a dog was brought into the classroom as part of that day's curriculum.

Buecksler was at the District Service Center Annex the day that Health and Safety manager Chris Pint brought his dog in a kennel for a half day so that he would not need to return home to retrieve his dog because he was about to go on vacation. Buecksler was there for a few minutes but the dog was not in a kennel at the time. On another occasion he witnessed an employee named Heather who brought her dog into the Annex to show her co-employees. Buecksler is also aware of other times where dogs were at buildings and their droppings had to be disposed of.

Association President Mike O'Shaughnessy testified that on October 2, 2014 he saw a cocker spaniel at the District offices brought in by a District employee's husband. Approximately six employees gathered around the employee's husband and the dog. O'Shaughnessy was in that building about five to ten minutes. On January 12, 2015 he was at the main office when the Building Chief's wife brought a dog into the building. O'Shaughnessy testified that he is not aware of any District policy or practice where an employee needs permission before bringing a dog into a building.

When Ratzlaff worked at Red Pines Elementary in the 1990's she regularly brought her dog into work with her and it walked along with her as she performed her tasks. The Principal and the Building Chief at Red Pine Elementary also brought their dogs to that school. Management witnesses testified that reasons have developed over time that would make it less feasible to take a dog to work, such as Somali American students, liability and safety concerns, though Ratzlaff was not aware of such changes.

As a result of what occurred on September 23 and 24, 2015 Lind and Schwanke issued Ratzlaff an October 2, 2014 "Notice of Deficiency and Suspension" that states in part:

> . . .
>
> **CAUSE FOR DISCIPLINARY ACTION**
>
> . . .
>
> 1. Bringing a pet to work with you and keeping it in a district building and on district property for several hours during work shift is not acceptable for a multitude of

reasons including compromising the sanitation of the building and playground, distracting staff and students, detracting from work time and being offensive in the culture of some of our students.
2. Questioning a staff member about why she shared with her supervisor that you brought a dog into the building is unacceptable, unprofessional and considered retaliatory behavior.
3. Electing to leave work and use sick leave after a supervisor brought an issue to your attention is not acceptable conduct or attendance. Discussing your job performance, conduct at work and attendance with your supervisors is a requirement of your employment with the District.

CORRECTIVE ACTION

You are hereby directed as follows:

1. Do not bring your dog or any other pet to work with you.
2. Do not confront or question staff who may have provided information regarding your performance, conduct or attendance at work. Communicate a professional, courteous and respectful manner in all interactions.
3. Do not use a phone for personal calls during your work shift; such use should be limited to your unpaid lunch break.
4. Do not leave work after performance, conduct or attendance issues have been raised.

DISCIPLINARY ACTION

This Letter of Deficiency constitutes a formal written reprimand in this matter and will become a part of your personnel file in District 196. You are hereby suspended without pay for five days as a result of your conduct …. Five days of pay will be deducted from your paycheck.

…

On November 6, 2014 a revised "Notice of Deficiency and Suspension" was issued. The October 2, 2014 included an allegation that Ratzlaff used the washing machine at CLC to clean her own blanket. The revised notice deleted the blanket allegation and corrected a date.

At the Level One Grievance meeting that Schwanke conducted, management was advised that on September 24, 2014 Ratzlaff left work because of mental stress/duress and that on September 25 she was off work because she was suffering from a longstanding medical condition and she went to a clinic that day. At the Level 2 grievance meeting that Director of Finance and Operations Jeff Solomon headed, management was again advised why Ratzlaff was off on September 24 and 25. In his December 5, 2014 response Solomon stated in part: "In response, I believe that the facts surrounding her use of sick leave on those days suggest manipulation."

DISTRICT'S POSITION

The conduct Ratzlaff engaged in on September 23 and 24, 2014 provides clear just cause for the letter of deficiency and 5-day suspension. Ratzlaff admits to two instances of conduct that on their face constitute misconduct. First, Ratzlaff admits she brought and stored her dog for a number of hours at a District educational facility hosting dozens of students and faculty for classes on September 23, 2014. At the time Ratzlaff brought her dog into work, she was on duty as a Custodian and was supposed to be cleaning, not dog sitting. Second, Ratzlaff admits that on the very next day, September 24, 2014, she pulled aside and questioned the employee who reported the dog incident to Ratzlaff's supervisor. Not one but two witnesses testified Ratzlaff confronted her co-worker in an angry tone. Both instances of misconduct standing alone would justify a 5-day suspension, given Ratzlaff's history. On top of that, however, the District offered substantial evidence that Ratzlaff engaged in other misconduct, electing to absent herself from work on September 24 after her supervisor brought the dog issue to her attention.

The District also presented Ratzlaff's employment history, which is riddled with performance issues and instances of misconduct similar to the conduct at issue here, and which were never grieved or challenged in anyway. This history serves as indisputable proof that Ratzlaff has engaged in similar misconduct in the past and was fully aware she could be disciplined for engaging in the misconduct that forms the basis of the arbitration.

The standard of just cause has been articulated in different ways, although one commonly used standard is the seven-part test set forth by arbitrator Carroll R. Daugherty. This seven-part test includes:

1. Did the investigation produce substantial evidence or proof of guilt?
2. Was the employee adequately warned of the consequences of her conduct?
3. Was the employer's rule or order reasonably related to efficient and safe operations?
4. Did the employer investigate before administering the discipline?
5. Was the investigation fair and objective?
6. Were the rules, orders and penalties applied evenhandedly and without discrimination?
7. Was the discipline reasonably related to the seriousness of the offense and the past record?

A more direct, two-step standard of just cause is as follows:

1. Whether the employer submitted sufficient proof that the employee engaged in the alleged misconduct; and
2. Whether the level of discipline is appropriate in light of the relevant circumstances.

The standard of proof in disciplinary matters is typically a preponderance of the evidence. The preponderance of the evidence standard can be described as follows: Is it more likely than not that the facts presented by one party, when weighed against the facts presented by the opposing party are true.

Most of the facts concerning the dog are not in dispute. There is no dispute that Ratzlaff bought her family dog to work with her on September 23, 2014. There is no question that she lodged the dog there for hours during a time when classes were in session elsewhere in the building. There is no dispute that she did not have permission from her supervisors for the dog, nor did she give notice to her co-workers. There is no question that the matter was thoroughly investigated by the employer and Ratzlaff had an opportunity to respond. What is in dispute is: 1) whether bringing a dog into work as Ratzlaff did is worthy of discipline; and 2) whether Ratzlaff had notice of that possibility. The District asserts that the overwhelming weight of the evidence makes it clear that both questions should be answered in the affirmative and discipline was an entirely appropriate response to Ratzlaff's conduct.

One way of analyzing just cause and whether conduct is deserving of discipline is to examine whether an employee's actions affected the employer's safe and efficient operations. Here, it is clear that the way in which Ratzlaff brought her dog into work affected the safe and efficient operations of the District and had the potential for harm.

First, it is undisputed that Ratzlaff brought her dog into work at the CVLC for several hours on September 23, 2014. It was not a short "visit" to show off her dog to co-workers, but a lengthy stay. Ratzlaff admitted in her September 30 interview with district staff that her dog was at the CVLC from 7:30 to 10:30 pm and her testimony in these proceedings was consistent with that. Aside from Ratzlaff's own testimony, the arbitration proceeding also featured testimony from a District witness that confirmed the presence of the dog for several hours at the CVLC.

Ratzlaff's "excuse" for bringing in the dog was that he had not yet relieved himself at home that night. The dog was not at the CVLC for an educational purpose. He was there to be boarded while Ratzlaff was at work. Ratzlaff did not offer explanation for why she did not simply leave her dog at home

and endure the natural (but not terribly burdensome) consequence that he might relieve himself in her home.

Ratzlaff's dog was also there during a time when the building was actively being used for classes. Linder provided uncontroverted testimony that there were 70-80 people, both students and staff, at the CVLC on the night of September 23, 2014, and that classes were being held that night until 8:30 p.m.

Further, while at the CVLC Ratzlaff did not take steps to appropriately secure her dog. She did not choose to leave him in her car. She did not tie him up outside. She did not kennel him within the building. She did not even leash him within the building. Rather, by her own admission, she set him loose in a children's room and also in a children's outdoor play yard.

Both Kathy Linder and Eric Lind testified that the children's room in which the dog was housed was used by small children and their parents for early childhood education during the day. They both testified that the room was full of children's toys and furnishings, many of which are on the ground and easily accessible to a dog.

Linder also provided uncontroverted testimony that she saw the dog on at least three occasions that night. She first encountered the dog after a student reported hearing a noise. Linder investigated the noise and saw the dog without a leash with free run of the children's room around 6:50pm. At some point later in the night, she saw the dog come out of the room, again without a leash. Then, when she was leaving for the night, she testified she saw the dog again in the children's room with Ratzlaff. The dog was not in a kennel and did not have on a leash during these occasions.

Without a leash or a kennel, the dog could have damaged District property by scratching, chewing or tearing at items or furnishings. Similarly, there are sanitation and health concerns when considering the spreading of dog hair and potential for dog waste on District property. This is all the more striking when you realize Ratzlaff's job was to clean the district building, not to dirty it.

Further, the parents of the children who used the areas used by Ratzlaff's dog never consented to or were given notice that a dog would be stored, un-kenneled, in the children's room for several hours. Those children may have allergies that could be negatively impacted by dog fur. The District is well

within its rights to discipline conduct that could pose a sanitation and health concern, especially when considering the potential impact on small children.

Another key concern about the presence of the dog is that it represents a personal pursuit when Ratzlaff should have been focused on work duties. It is uncontroverted that Ratzlaff needs to move around the CVLC to complete her tasks and she cannot complete her work whenever she wants, wherever she wants. She is paid hourly and is expected to be on task during all non-break times. Monson gave uncontroverted testimony that Ratzlaff had been informed to do more than the bare minimum and, if she believed she was done with minimum cleaning tasks, she was supposed to shift her focus to more "long-term" cleaning projects during non-break times. Ratzlaff had recently received written direction to perform custodial duties at all times during assigned work hours.

Despite the requirement that she exclusively attend to her job tasks while on duty, the evidence shows that Ratzlaff spent an inordinate amount of time in the children's room with her dog on the night of September 23. Common sense dictates she was not cleaning that room the entire time, nor was she capable of cleaning other parts of the building during that time.

Linder testified that Ratzlaff is usually in the children's room for 20-30 minutes at best on Tuesday evenings. Linder testified, however, that on the 23rd, Ratzlaff was in that room for the better part of 7:15 to 8:30 p.m. Linder saw or heard her in or entering that room three times that night. The first time was when she checked on Ratzlaff around 7:15 p.m. and heard Ratzlaff on her cell phone in the room. The second time was when Ratzlaff retrieved her dog from the hallway and went back in the children's room with him. The third time was at 8:30 p.m. when Linder interrupted Ratzlaff's cell phone conversation and had a brief conversation with Ratzlaff in the children's room. She never heard vacuuming sounds coming from the room as she usually would when Ratzlaff cleaned it.

Linder's observations regarding Ratzlaff's use of her cell phone when she was supposed to be working was echoed by an employee at the RCLC whom Lind spoke to later when he called to inquire about the dog. Moreover, during that very time period, it was usual for Linder to see Ratzlaff cleaning throughout the first floor and to hear sounds of Ratzlaff's cleaning. Linder did not see or hear Ratzlaff

cleaning the first floor at all that night. Tellingly, Linder testified it was usual for Ratzlaff to move her equipment around the first floor as she cleaned. On the night of September 23, however, that equipment stayed parked in front of the children's room from 7:15 to 8:30 p.m.

The District is surely within its rights to take action when an employee uses work time to dog sit, rather than to perform expected job tasks. This is all the more true when the employee has been told time and again to stay focused on her work duties and not to get sidetracked by personal issues and needs. This is just the latest in a long line of ways that Ratzlaff has let her personal issues unhinge her work life.

A dog in a public workplace also distracts others. It is uncontroverted that the dog interrupted a portion of Linder's job duties when she had to spend her time investigating the dog noise instead of attending to her regular duties. Linder even had to leave her desk during a moment in which she was timing a test for a student. The dog no doubt interrupted the student as well. Instead of focusing on the test, which – again - was being timed, the student had to spend several moments listening to the dog and reporting the concern to Linder. This is certainly a distraction that takes away from the mission of the District and the District is within its rights to address it.

A dog in a public building, especially when not leashed, may also be disrespectful and discourteous to some. Linder and Lind both testified that Somali American were present on September 23 and they both testified of their awareness that some in the Somali American community view dogs in buildings as improper. Linder and Lind both testified that the children's room was often used for prayer by members of the Somali American community. The District no doubt serves a diverse population. It is well within its rights to ensure its facilities are open and accessible to all and not threatening to any member of the public.

The manner in which Ratzlaff brought her dog into the CVLC also exposed the District to unnecessary additional risk. Dogs can be liability concerns. They can behave irrationally. If not properly kenneled or leashed, as was the case here, they could bite a person. Moreover, the District cannot prepare for that liability if it is given no notice that the dog will be stored in its facilities for several hours.

In the course of the arbitration proceeding, Ratzlaff suggested that her misconduct was excusable as no one was maimed, nipped, hurt or harmed in anyway by the dog. This defense has no merit. The just cause standard does not require that an employer prove actual harm; the lower threshold standard is whether the conduct related to the safe and efficient operations of the employer. The District has shown that it indeed did. Further, the District is well within its rights to discipline conduct that presents a potential for harm. For instance, if an employee throws a paint can at the head of another employee and misses, there is no actual harm, but surely discipline would be warranted as there is the potential for harm. Ratzlaff's conduct, bringing a dog into a public building for several hours without a leash or a kennel, certainly presented the potential for harm (both physical, operational and reputational) and warranted action.

Finally, it comes down to something that has, unfortunately, been the hallmark of Ratzlaff's career with the District, unprofessional conduct. The CVLC is a professional building of a school district charged with the important mission of educating children and adults in this community. More so than other employers, the public puts its trust in the District and expects it to behave responsibly and professionally. One can easily see how members of the public might view a dog in a public building as unprofessional and out-of-line with its important mission, especially when classes are in session and the dog is not there for an educational purpose, unleashed, not kenneled, and in a children's room. It was unprofessional for Ratzlaff to give her dog free reign of the children's room and to bring it outside to attempt to relieve itself on a children's play area.

In sum, the District had more than an adequate basis to discipline Ratzlaff for bringing her dog into work. Her conduct was unsanitary, disrespectful, unprofessional, distracting to others, distracting her from work. It also had the potential to, among other things, increase the District's liability, offend others, aggravate children's allergy symptoms and detract from the important mission of the District.

Just cause requires an employee to be aware or have some notice that her conduct may be subject to discipline. Ratzlaff is wrong, however, when she asserts that the District must prove she subjectively knew the conduct was wrong or prohibited. This is not the law. If this were the case, any time Ratzlaff

took the stand she could escape discipline simply by asserting that it was her subjective belief that the conduct she engaged in was not prohibited or wrong. The standard is objective; namely, whether Ratzlaff knew or reasonably should have known the conduct was wrong. In the present case, the evidence is clear that Ratzlaff knew or should have known that she could be disciplined for bringing her family dog into the CVLC in the manner she did.

Arbitrators have long held that a written policy is not required when disciplining an employee for misconduct. In at least two circumstances—both of which are applicable here—an employer is well within its rights to discipline an employee for conduct without a written policy in place that proscribes that conduct. In such circumstances, it is implied that the employee knew their conduct was wrong.

First, if common sense dictates that certain conduct is inappropriate, the employer is justified in taking action, even if no written policy is in place proscribing that conduct. This makes sense. Employers cannot possibly circumscribe in writing every act of human transgression and it would be senseless to try to do so.

Second, the law of arbitration also states that past disciplinary letters and actions can provide the warnings requisite to put an employee on notice that she may be subject to discipline for similar conduct in the future. In those instances, where an employee has engaged in misconduct, a letter indicating that past conduct was inappropriate, or which sets forth expectations going forward, serves as the notice requisite to discipline an employee for similar conduct in the future. The past conduct does not have to be identical to the present conduct for the letter to serve as effective notice —the conduct simply has to be similar. The employer is not required to prove actual, subjective knowledge on the part of Ratzlaff where such notification has already been delivered to the employee.

In this case, both common sense and previous personnel letters put Ratzlaff on notice that she could be disciplined for bringing her dog to work in the manner she did.

The District does not have a written policy stating that persons cannot bring their dogs into district buildings. Nor would it want one—dogs are sometimes employed by school staff for educational purposes, as illustrated by Ratzlaff's own evidence. Further, public entities are required by law to permit

service animals. Ratzlaff was not disciplined just for bringing a dog past a district doorway. She is being disciplined for the manner in which she brought her dog into work.

Common sense dictates that a custodian charged with cleaning a district building does not:

> ● Without permission or consent, bring their dog into work for several hours while classes are occurring without a leash or kennel;
> ● House the dog in a children's room, which could dirty the room and impact children's allergy symptoms; and
> ● Spend a significant amount of work time dog-sitting the pet, instead of cleaning, especially when that custodian has been told repeatedly not to engage in non-work related activities and was under scrutiny for her job performance. A reasonable person would understand that it is an anomaly, rather than the norm to bring a pet into a place of business. The everyday experiences of the average person informs them that it is not typical to see a dog (other than a service animal) in a grocery store, mall, gas station, courthouse, etc… When it is allowed in such places it is remarkable, not customary. No written policy was required to put Ratzlaff on notice that she could be disciplined for the above misconduct. Common sense already dictates that she should have refrained from engaging in that conduct.

Common sense was not the only thing that gave Ratzlaff advanced warning of the consequences of her misconduct. Ratzlaff was also on notice through past disciplinary actions and letters. As of September 2014, Ratzlaff had already been warned twice in writing about bringing family members into work. As with unauthorized dogs, unauthorized family members pose liability concerns and can distract from work duties. Again, the conduct does not have to be identical, just similar. After Ratzlaff had been told twice not to bring family members into work, she knew (or at least should have known) that it was inappropriate to bring a family dog into work for a number of hours when was supposed to be cleaning.

On top of that, by September 2014, Ratzlaff had repeatedly been told not to engage in activities that would distract from her work. Specifically, Ratzlaff has been told not to use the computer excessively for personal surfing, not to nap at work, and not to talk excessively about her personal problems with teachers and students. She was directed to "perform custodial duties at all times during your assigned work hours." Under these circumstances, Ratzlaff should have known she should not store her pet at work while she was supposed to be working.

Ratzlaff had also been told repeatedly to interact with others in a professional and/or courteous manner. Ratzlaff knew or should have known that engaging in an unprofessional activity that distracts from her work duties, taking care of her dog for several hours, was inappropriate conduct.

Each of the times that Ratzlaff received the directions described above, she was also told that a reoccurrence of similar conduct could result in discipline. Certainly, the progressive discipline she received in October 2014 should have been expected. What is shocking is that she chose to board her dog at work just the day before a scheduled meeting to discuss her progress on performance concerns.

Attempting to escape from her obviously inappropriate conduct, Ratzlaff claims she did not know bringing a dog into work constituted misconduct because of alleged prior instances in which dogs have been in the District's buildings. These other instances of dogs being present in District buildings, even if accepted as true, are only relevant if: 1) they involve similarly-situated individuals and a similar set of circumstances; and 2) Ratzlaff actually had knowledge of the incidents prior to bringing her dog into the CVLC on September 23, 2014. Ratzlaff did not demonstrate such facts.

Ratzlaff only presented her self-serving testimony that she was permitted to bring her dog into work at Red Pine Elementary School when she worked for the district in the late 1990s. This fact carries no weight, even if it is true. First, the claimed conduct happened over 15 years ago. Between that time and her re-hiring in 2008, Ratzlaff had a nearly a decade long break in service. It is not disputed that in 2008 she was hired as a brand new employee at a new location in a new position with a new supervisor. Ratzlaff admitted she was never told that all the terms and conditions of her previous employment with the District carried over to her new employment with the District and it would be unreasonable for anyone in Ratzlaff's position to assume they did.

The facts are distinguishable as well. First, in the 1990s Ratzlaff did not have a disciplinary record and was not under scrutiny for her work performance. The conduct was authorized by her supervisors at the time. Second, in the intervening time period, Ratzlaff has been warned on two occasions about bringing family members into work and has been warned repeatedly to act professionally at work and not to get sidetracked by non-work distractions. Finally, much has changed between now and 1999 in regards to workplace standards of conduct. Monson, someone with years of human resources experience, testified that employers, including the District, are more sensitive to externalities being

introduced into the work environment, such as certain foods and other items that may negatively impact health.

During the arbitration proceeding, Ratzlaff also claimed that dogs have visited other District buildings in the recent past. These incidents can be deemed sporadic at best and do not show that the District has a pattern or practice of allowing dogs into its buildings in the manner in which Ratzlaff brought her dog to work. First, aside from one highly-distinguishable incident, there was no evidence that Ratzlaff witnessed or even heard about any of these dog incidents. Those incidents are therefore irrelevant to the issue of her notice. Second, every other dog incident that Ratzlaff introduced is highly distinguishable from the facts of this case. Accordingly, even if she had knowledge of them prior to September 23, 2014, it would have been completely unreasonable for her to rely upon them in bringing her dog into work at the CVLC.

The testimony Ratzlaff introduced on the topic of dogs in other buildings came from Buecksler and O'Shaugnessy. Both are Association representatives who have an interest in ensuring that the relevant collective bargaining agreement, including its just cause provision, is interpreted in a pro-employee fashion. Both are also District-wide employees with unique opportunities to visit different District building sites. Even so, Buecksler testified that he sees a dog on District property, on average, once per year. Since October 2014, a six month period, O'Shaugnessy has only seen dogs on District property on two occasions. This is certainly not a pattern or practice of allowing dogs into the workplace environment, especially given the size of the District, the public nature of its facilities, and the number of employees and visitors it averages every year.

Buecksler has not witnessed a single incident in which he could confirm that an employee brought a dog into a District building during that employee's work shift. He has been witness to only one incident in which he could confirm that an actual employee has brought a dog into a district building, but that was when the employee was off duty and it was at a District maintenance facility (discussed below). In all other incidents in which Buecksler testified about a dog on District property, he could not say:

- whether the dog was actually brought in by a District employee or by another member of the public;
- if an employee had in fact brought the dog in, whether the employee was later disciplined for bringing the dog onto District property;
- whether the person who brought the dog in had permission from administration or whether the administration even had knowledge of the presence of the dog; The District cannot be expected to address something it does not know about. This underscores the fact that the district is a public body—unlike a private employer, it cannot and does not lock its doors to members of the public.
- whether the person who brought the dog in—if in fact an employee—was already under scrutiny for their performance;
- whether the dog was there for an educational purposes; and
- whether the dog was in the building for more than a brief few minutes.

School was not in session in most of these instances as well. In the one instance he saw a dog where school was allegedly in session, the dogs were outside the school for Environmental Studies building and were obviously there for an educational purpose.

Moreover, Buecksler testified he had "heard" about dogs being on District property wherein the dog had relieved itself and the waste needed to be cleaned. This only supports the District's position that dogs on District property are in fact a concern to the District. Buecksler even admitted that, in some cases, dogs on District property could be concerning. For instance, he said it may be a concern if an employee, as Ratzlaff did, brought her dog into work for an entire half-shift and, as was the case here, the dog detracted from the employee's work duties. Buecksler also testified that, in some cases, the District would have the right to discipline an employee for bringing a dog into the workplace even in the absence of a written policy prohibiting such conduct.

In the case of O'Shaugnessy, both instances that he testified about involved a dog that had been brought into a District building by a person who does not even work for the District. Moreover, O'Shaughnessy could not say why the dogs were in the building, whether they had permission to be in the building, how long they were in the building (he could only testify they were there for a few minutes), and he could not say that any employee was distracted from their work duties because of the dog. There was also testimony that two dogs have been seen at the District Service Center-Annex. The Annex is a maintenance and facilities department building which, among other things, serves as a garage for school busses. No students are present, no teachers are present, no classes occur there and—as Buecksler

testified—it's rare to see a member of the public in the building. The Annex is a garage and facilities building, it is not a school. Those facts alone materially distinguish the presence of the dogs at the Annex from this case.

Buecksler testified that he saw Heather Nosan with her dog at the Annex for a very brief amount of time. Nosan was not on duty when she had her dog at work and brought her dog in to show him off to co-workers. Buecksler cannot say that it detracted from any employee's work performance, how long the dog was in the building and whether Nosan had permission to bring her dog into the building. There was no testimony that any member of the public was around the dog. There was no evidence that Nosan has a disciplinary history or has been directed to stay focused on work and not become distracted by personal matters.

Buecksler also provided testimony that Pint brought his dog into the Annex on one occasion. Again, this scenario is highly distinguishable. The dog was present in a facility that does not serve members of the public, like students. Schwanke, Pint's supervisor, testified that Pint had permission to bring the dog into work and that every employee in Pint's department who was present had consented to the dog being at work. Unlike Ratzlaff's dog, which ran loose in a children's room, Schwanke also stated the dog was in a kennel for most of the time. There was no evidence that Pint or any other employee was distracted from their regular work duties, and, unlike Ratzlaff, Pint has no disciplinary history and has not been directed to stay focused on his job duties while at work. He is an administrative employee who is not paid on an hourly basis and is not expected to move throughout a building cleaning during work hours.

In sum, the alleged incidents, if they are taken as true, are so distinguishable that even if Ratzlaff had seen or heard about all of them before September 23, 2014 (which she did not) it would have been unreasonable for her to rely upon them in bringing her dog into work in the manner she did. It would have been even more unreasonable for her to rely upon them in the face of the scrutiny of her performance and the specific direction to keep family members out of the workplace, to stay on task, not get distracted by personal matters and to be professional.

Ratzlaff is also being disciplined for inappropriately confronting the employee who reported the dog misconduct. This basis for discipline does not hinge on whether the confrontation was retaliatory or not—although it most certainly was. That is, Ratzlaff was not disciplined solely because her confrontation with Linder was retaliatory. In addition to that, she was disciplined because the confrontation was an overall unacceptable and unprofessional workplace interaction.

The main issue for this basis for discipline is not whether inappropriate workplace interactions (such as retaliatory statements) are conduct warranting discipline; there is no doubt they are. The main issue is whether an inappropriate and unprofessional interaction actually occurred. As discussed below, there is no doubt one did.

It is undisputed that Ratzlaff asked Linder why she reported to Lind that Ratzlaff brought her dog into work. It is undisputed she did this at the CVLC shortly after being told by Lind on September 24, 2014 that she would need to meet with him to discuss the dog misconduct. It is also undisputed that Linder was in a room with Habeck when Ratzlaff approached and asked her to step outside the room before she delivered the question. She admits to that, and two district witnesses, Linder and Habeck, testified to that. The testimony of District witnesses and the testimony of Ratzlaff only materially diverge when it comes to the issue of how the question was delivered, whether it was delivered curiously or with anger. Ratzlaff claims it was delivered innocently, while two district witnesses testified it was delivered with anger and in a hostile manner.

The act of asking a coworker why they reported one's misconduct to a supervisor is unacceptable, unprofessional and retaliatory, regardless of the tone. The angry tone certainly adds to the situation and does not help Ratzlaff. However, it would be unreasonable to conclude that the tone in which a statement is delivered determines whether it is appropriate or not. Such a conclusion would mean an employee could say anything threatening they liked to a colleague and, so long as they did so with a smile or curious look on their face, escape discipline. The content and context of a communication determines whether it is workplace appropriate or not. At the very least, the act of pulling a co-worker out of a room in mid-conversation and directly asking why they reported one's misconduct makes that co-worker feel

uncomfortable in the workplace. This is exactly how Linder said she felt after being asked the question by Ratzlaff. Such questioning also has the tendency to make the co-worker feel like that she was wrong to report the misconduct and that she is now being watched by the employee whose misconduct she reported. This is all the more true when taking the timing of the question into account. In this case, Ratzlaff presented the issue with immediacy, pulling aside and confronting Linder on the very day in which the misconduct was reported and shortly after she was told by Lind of the need to meet with him. In sum, the very act of pulling a fellow employee aside and questioning why she reported one's misconduct is unprofessional, inappropriate and retaliatory conduct.

What is more, the question was in fact delivered in a hostile tone. It comes down to quantity and quality of evidence, both of which favor the District. Two witnesses testified that Ratzlaff's body language was hostile and she delivered the question in an angry tone. The District therefore has a greater quantum of evidence supporting its position.

The District submits that its witnesses are more credible and provide a more realistic story. Arbitrators judge credibility by the witness' interest in the outcome of the matter. What the witness has to gain and what the witness has to lose are important questions in determining credibility. In this case, Linder and Habeck are neutral witnesses. They are employees of the District, but they are not management and they have no say in disciplinary decisions. They have nothing to gain or lose in the proceeding. Ratzlaff, on the other hand, knows what is at stake in this arbitration. She has more to lose than anyone else in these proceedings and, accordingly, she has every incentive to stretch the truth. Her testimony should be given far less weight than the testimony of two neutral fact witnesses.

Linder's and Habeck's testimony is also the most believable. From a common sense perspective, someone who departs a meeting with their supervisor after being told of their misconduct and pulls another co-worker aside in mid-conversation to question why they reported the misconduct is not doing so in an overly friendly tone. Questions of mere curiosity are usually not raised by a person who is confronting the very coworker who, they just learned, alerted their supervisor to their misconduct. Nor are such questions delivered with such immediacy. Additionally, someone who merely wants to ask a

question out of curiosity typically does not interrupt another in mid-conversation and ask them to step out of a room.

The angry tone is also evidenced by Ratzlaff's own words as well. During cross-examination, Ratzlaff admitted that before the confrontation she was "taken aback" when she found out Linder had reported the dog incident. She admitted that she was upset after she confronted Linder as well. Moreover, on September 30, she told District staff the reason she left the workplace was because she had "had enough." The plain meaning of the expression is to be appalled or outraged with something. Ratzlaff was in fact angry that day; she admits she was angry both before and after her confrontation. In fact, she was so angry, she left work that day. It requires no stretch of the imagination to believe that someone in such a position is going to present an angry tone *while* confronting the very person who told on them.

Lind, Linder, and Habeck all testified that they had witnessed Ratzlaff become angry and combative at work. Linder specifically said that Ratzlaff had shown her confrontational side in the past at work and could easily flip a switch and become angry. This is exactly what happened in this instance. Ratzlaff did not walk directly out of an interaction with her supervisor, pull Linder aside and ask her why she reported her misconduct in a curious tone. She was angry, as evidenced by not one, but two witnesses.

In sum, Ratzlaff's confrontation with Linder was inappropriate and retaliatory on its face. Her angry tone, as evidenced by two neutral witnesses, the nature and timing of the confrontation, and her own admissions, only provides more justification for this basis for discipline.

Ratzlaff does not dispute that unprofessional and retaliatory statements warrant discipline, nor could she. Unprofessional communications make others feel uncomfortable in the workplace, have a negative impact on working relationships and have a deleterious effect on the overall professional workplace environment. Additionally, retaliatory interactions cause others to feel threatened at the workplace, stymy employer investigations into misconduct and chill future reports of misconduct by causing fear and intimidation in employees. Conduct that could be perceived as retaliation equally warrants discipline as it has the same negative impact on the workplace. Someone who perceives

retaliation can be just as intimidated and feel just as threatened as someone who was the victim of open and obvious retaliatory conduct.

In this case, there is no dispute that Ratzlaff's behavior made Linder feel uncomfortable and that she viewed the confrontation as inappropriate conduct—as any reasonable person would. The District therefore had a basis for imposing discipline on Ratzlaff for her confrontation with Linder.

As with the dog misconduct, Ratzlaff was fully aware she could be disciplined for confronting Linder in the manner she did. First, common sense dictates you do not question another employee why they reported your misconduct to a supervisor, let alone question that employee in a hostile and angry tone. Second, nearly every letter Ratzlaff has received since 2009 includes a large disclaimer stating: "We caution you that you may not engage in any retaliation toward staff members or others who may have provided information in this matter. Any retaliation by you will constitute grounds for disciplinary action."

Third, Monson provided credible and uncontroverted testimony that in the past she has told Ratzlaff during prior investigations that she should not retaliate against anyone she believes may have reported her misconduct. What is more, Monson stated she was certain she had advised Ratzlaff prior to September 2014 not to engage in any behavior that could be perceived as retaliation. There is no doubt Ratzlaff violated those numerous verbal and written directives and warnings in confronting Linder on September 24.

Lastly, time and again, Ratzlaff has been disciplined for interacting with others in an inappropriate, discourteous, disrespectful and/or combative manner in the workplace. Again, Ratzlaff is not being disciplined just because her confrontation with Linder was retaliatory; she is also being disciplined because the confrontation was overall unacceptable and unprofessional workplace behavior. Asking a colleague why they reported one's misconduct is not professional; it is inappropriate, discourteous and disrespectful. Asking the question in an angry tone is even more unprofessional and disrespectful for obvious reasons. Since 2010, Ratzlaff has been directed at least 8 times in writing to treat others in a courteous and/or professional manner.

For example, in February 2012, she was directed to interact with others in a professional and courteous manner after engaging in an abrasive and combative communication with a co-worker in which she admitted to saying she was "sick and tired of your crap." In August 2014, she was directed to communicate with others in a professional, courteous and respectful manner in all interactions after she was disrespectful and curt to her supervisor, employing an angry tone with him and hanging up the phone on him. These are just two examples of numerous instances where Ratzlaff has been specifically directed to engage in professional and courteous interactions after being curt, disrespectful and/or combative to co-workers and others. In short, Ratzlaff knew she was expected to interact with others in a professional and courteous manner in all interactions and she knew she could be disciplined for failing to follow those numerous past directives. She violated that work expectation when she confronted Linder in an angry tone on September 24, 2014.

Finally, Ratzlaff last act of misconduct was her misuse of time off after being notified by her supervisor that he had concerns about the presence of a dog in the workplace. The episode was the latest in a long history of unreliable attendance and a cavalier attitude about the use of paid time off. Under such circumstances, it was appropriate for the District to base discipline, in part, on her conduct relative to her attendance and use of sick leave.

Good attendance is a basic expectation employers are entitled to depend upon. The efficiency of an employer's operations requires that employees show up on time and fit to perform their duties. Absences should be infrequent, requested in conformance with procedure and for good cause. Employers are well within their authority to discipline employees with attendance problems and to enhance penalties progressively if attendance does not improve.

The labor contract between the Association and the District indicates that sick leave "shall be allowed by the School Board whenever an employee's absence is found to have been due to illness of the employee or employee's child which prevented the employee's attendance and performance of duties on that day or days."

On September 24, 2014, Ratzlaff appeared fit for work. She did not appear sick, she did not say she was sick, she gave no indication she had a medical appointment of any kind scheduled for that day. Things only went awry after Lind informed Ratzlaff that he needed to speak with her about the fact she had brought a dog into work for several hours the previous night. After she was informed of the need to meet with Lind about the dog misconduct, she hastened to Linder and confronted her in an angry tone. After this, Ratzlaff left the workplace. She called and told Lind that she was taking leave—she did not say why. She did not seek permission. The next day, the day on which Ratzlaff was supposed to meet with Lind about the dog misconduct, Ratzlaff called in sick.

With legitimate concern about the suspicious timing of Ratzlaff's urgent need to leave on September 24 and take a sick day on the 25th, Ratzlaff was asked in her investigative interview on September 30th why she had taken leave. Ratzlaff did not say it was because she was in fact sick. Instead, she said it was because she had "had enough." During her hearing testimony, Ratzlaff still did not say she left on September 24 because she was sick. She said she was "very upset", "stressed" and an "emotional wreck," apparently because of the continuing scrutiny of her performance.

Being frustrated because of an employer's desire to meet with you about your misconduct is not an excusable basis for taking sick leave. We all experience workplace stress, and have times when being at work is unpleasant, but this does not provide excuse to evade work. Employers have the right to know what type of leave their employees are requesting and it would be grossly inefficient and harmful to pay employees for taking sick leave when they are in fact not legitimately entitled to take it and using it only as a means to avoid discussing work misconduct.

Nor can Ratzlaff claim that she was unaware she could be disciplined for manipulating sick leave. In August 2014, just two months before the events at issue here, Ratzlaff was directed to report leaves truthfully and was disciplined for taking time off immediately after being informed by a supervisor that he needed to talk with her about a workplace concern. Moreover, the collective bargaining agreement puts employees on notice that they may report sick leave only when there is a legitimate basis for doing so.

At hearing, Ratzlaff suggested that privacy concerns were part of why she did not reveal more about her use of leave on the 24th and 25th. This seems both insufficient and disingenuous. First, privacy concerns surely were not at issue regarding her departure on the 24th when she left because she "had enough." As for the legitimacy of her privacy concerns on the 25th, such concerns had not interfered with her use of sick leave in the past (over 20 times in the past two years before September 2014). Moreover, she knew the District did not require disclosure of the exact nature of the sickness.

At hearing, for the very first time, Ratzlaff produced numerous medical records relating to a gynecological health condition (menorrhagia and a posterior fibroid). Ratzlaff sought treatment for the condition in the days and weeks following her departure from the workplace on September 24, 2015. The District does not dispute the existence of her gynecological condition. What it disputes is that the condition motivated her departure on the 24th. Ratzlaff acknowledged both before and during the hearing that she left work on the 24th because she was upset and frustrated over the fact that her supervisor wanted to address the dog issue, not because of her gynecological condition. Less important, but still questionable, is whether such an ongoing chronic condition was a sufficient basis for her to evade the following day's workplace meeting with her supervisor which he scheduled to address an acute workplace concern. Ratzlaff's medical records show that the bleeding that brought her to the doctor on September 25th had an onset of two weeks prior and was part of a three-year pattern with heavier than usual menstruation. Notably, her medical records from that period also reflect a normal psychological state and a normal/bright affect with no symptoms associated with mood.

Given the above, the District has provided ample evidence that Ratzlaff left work and took leave only after being told by Lind that he would need to meet with her to discuss his concerns over Ratzlaff bringing her dog into work. She had been directed in the past not to engage in such conduct. It was the latest example of unacceptable attendance issues and was deserving of discipline.

At oral argument, counsel for Ratzlaff all but conceded that a 5-day suspension and notice of deficiency would be justified, assuming it is found that Ratzlaff did in fact engage in misconduct. Further,

Ratzlaff is not seriously contesting that the investigation into her misconduct was flawed or unfair. Still, the District will address both these issues before concluding.

The collective bargaining agreement mandates adherence to the concept of progressive discipline and calls for "accelerated" discipline for "repeated misconduct." Ratzlaff's 5-day suspension and notice of deficiency is in line with these provisions of the CBA, as well as her prior disciplinary record. Beginning in 2009, Ratzlaff received two non-disciplinary letters relating to her performance and conduct concerns. In December 2010, she received a disciplinary verbal warning, which was memorialized in writing. Three months later she received her first disciplinary notice of deficiency, which was then followed by a second notice of deficiency and 2-day suspension. In hopes of starting her off on a new foot after she transferred to the CVLC, the District actually went down to a performance review letter when it next had concerns about Ratzlaff's conduct and performance. Following that, discipline increased progressively to a letter of direction, a notice of deficiency, a notice of deficiency with a 2-day suspension, and then, finally, a notice of deficiency with a 5-day suspension.

Additionally, adding to the appropriateness of the discipline is the fact that Ratzlaff has already been disciplined for and directed not to engage in similar misconduct in the past. As evidenced by the attached Appendix A (which was the demonstrative exhibit used by the District during closing arguments), before bringing her dog into work, she was warned twice not to bring family members into work and to stay on task while at work. Before confronting Linder, she had been advised on at least 8 occasions to interact in a professional and courteous manner with co-workers and had received numerous letters warning her against retaliatory conduct. Before taking sick leave after being informed of the need to speak with her supervisor, she had already been warned to report absences truthfully in a similar context. Finally, in numerous letters, Ratzlaff has been reminded that she is expected to comply with all past directives and that future misconduct could lead to further disciplinary action. Clearly, the 5-day suspension is in line with Ratzlaff's long prior history of disciplinary issues, the concept of progressive discipline and the provision of the CBA permitting the District to accelerate discipline for "repeated misconduct."

The discipline is in line with the seriousness of the offense as well. As explained above, the dog misconduct was unsanitary, disrespectful, unprofessional, and distracting to others. It can and did distract from her work, and had the potential to, among other things, increase the District's liability, offend others, aggravate children's' allergy symptoms and detract from the important mission of the District. Her angry confrontation with Linder was outside the bounds of acceptable workplace conduct, had the tendency to cause fear and intimidation, and made Linder feel uncomfortable. In addition to those instances of misconduct, Ratzlaff chose to absent herself from work after being informed of the need to speak with her supervisor about the dog misconduct.

The discipline imposed is also in line with the treatment of other employees. Monson testified that Ratzlaff is unique; Monson knows of no other custodian who has had so many letters of discipline and direction in their file before receiving a 5-day suspension. If anything, it seems Ratzlaff has been given more second chances than any other employee in her situation deserves. Nevertheless, Monson provided uncontroverted testimony that the discipline imposed on Ratzlaff is in line with the progressive discipline that has been imposed on other custodians with multiple instances of misconduct. In other words, the gradual acceleration of discipline for repeated misconduct (moving from letters of direction to notices of deficiency to suspensions of increasing length) is in line with how other custodians have been treated.

Lastly, as explained above, while other employees have on a few limited occasions brought dogs into the workplace, those occasions are entirely distinguishable from the conduct at question and not deserving of the same treatment. Ratzlaff and her witnesses could not provide a single firsthand account of an employee bringing a dog into work during their shift at a facility hosting classes. Moreover, they could only provide hearsay evidence of one occasion in which an actual District employee brought a dog into a building while that employee was working. That instance is highly distinguishable. The employee who brought his dog into work had permission from his supervisor and co-workers, kept the dog in a kennel for a good majority of the time, and did not have a disciplinary record, let alone a disciplinary record which included discipline and directives relating to being distracted at work. That incident also

occurred at the District's Annex, a building used by facilities staff which does not host classes or members of the public. Additionally, that employee did not engage in the other misconduct (such as inappropriate and retaliatory communications) that forms the basis for this arbitration.

Given the circumstances of this case and Ratzlaff's prior record, the 5-day suspension and notice of deficiency is justified. The treatment of Ratzlaff has been even-handed, and consistent with the concept of progressive discipline.

The District conducted a thorough and fair investigation into Ratzlaff's misconduct. First, only days after the relevant events occurred, Ratzlaff was given the opportunity to present her side of the story with her union representative present and after being given a Tennessen warning. It is not disputed that she was given a chance to respond to every material fact that forms the basis of her discipline. The questions Ratzlaff was asked, along with her responses, were memorialized in writing.

Other employees who had knowledge of the relevant events were immediately interviewed by Lind, and he promptly memorialized those conversations in writing. It is uncontroverted that the entire investigation process was completed just days after the events in question.

The disciplinary decision-making process was also conducted fairly. Monson testified that the decision was made by a team of persons, many of whom were removed from the investigation. She also testified the decision-makers looked at all relevant factors—including the nature and severity of the conduct, Ratzlaff's version of the events, and Ratzlaff's overall performance history, including her long history of discipline and performance issues as well as her overall years of service with the District. Finally, Monson testified that the decision to discipline Ratzlaff was made only after the impartial investigation into her misconduct had concluded.

In sum, it is not and cannot be disputed that the District's investigation and disciplinary decision-

ASSOCIATION'S POSITION

Ratzlaff did not engage in misconduct to warrant any disciplinary action in this case, let alone a "formal written reprimand, five day suspension, and last chance warning." The causes for disciplinary action presented by the District in its written disciplinary "Letter of Deficiency" include: 1) bringing a pet to work on September 23; 2) engaging in retaliation against a co-worker; and 3) inappropriate use of sick leave to avoid a supervisor meeting. The District has the burden of establishing that the Grievant engaged in misconduct based on these causes. The District has not come close to meeting this burden.

Ratzlaff was in the midst of serious medical issues having just been to the doctor the day before the October 2 meeting and three times within a week of the October 2 meeting. She readily admitted, she was overly emotional at that time.

While the District has fought to expand this case far beyond the "three causes for disciplinary action" as set forth in the disciplinary letter, this over-prosecution, "gilding the lily", misdirected approach to convicting Ratzlaff speaks volumes about the weakness of the District's case. The Arbitrator should not be swayed by the attempt to make this case about Ratzlaff's difficulties at Apple Valley High School during previous years. It is not about that. Indeed, since Ratzlaff has moved facilities to RCLC and CVLC, her performance record has greatly improved though the District does not want to admit it.

This case flows from Ratzlaff's bringing her dog to work for half her shift on the evening of September 23, 2014. The issue is not whether or not Ratzlaff did this. She immediately, readily, and openly admitted doing this. The issue is whether it is misconduct warranting disciplinary action to do this. Ratzlaff had no knowledge that there was a work rule, policy, or practice prohibiting dogs from being brought to work. This is not surprising because the District admittedly has no such rules, policy or practice.

One of the two most commonly recognized principles in the arbitration of discipline cases is that there must be reasonable rules or standards, consistently applied, and enforced and widely disseminated. Concerning notice of rules, arbitrators have stated arbitrators will not uphold a penalty for conduct the

employee did not know was prohibited, unless the conduct is so clearly wrong that specific reference is not necessary.

The District has failed to establish that Ratzlaff knew that bringing her dog to work on September 23 was prohibited. Moreover, the District has failed to meet its burden to show the conduct was so clearly wrong that Ratzlaff did not need to be informed. The District has the burden to show that this conduct is "so clearly wrong" that there was no need Ratzlaff be informed. One of these two burdens must be met by the District or they cannot prevail in this case.

There is little dispute that Ratzlaff did not know bringing her dog to work violated a work rule, policy, or practice of the District. The District has no written (or unwritten) work rule or policy prohibiting employees from bringing a dog to work. The District has never issued any written bulletins to its employees regarding any such prohibition. Ratzlaff has never been told by anyone at the District, including any of her supervisors, that there is such a prohibition.

More particularly, Ratzlaff clearly had no idea that a dog was prohibited from the workplace in light of the fact that she had regularly brought her dog to the workplace when she held a similar custodial position at Red Pine Elementary from 1994 to 1999. Her dog at the time was brought to the workplace with full knowledge of the principal of the school and the building chief of the school. Indeed, the building chief himself also brought his dog on occasion to work. Ratzlaff has seen other dogs in facilities at the District. This testimony is all undisputed.

The District's argument that Ratzlaff's experience in the late 90's is irrelevant to her knowledge of District policy in 2014 is specious. There is no basis for Ratzlaff to know that District policy has changed. Again, it is the District's burden to make its rules clear. That never occurred here.

There was also substantial evidence that others throughout the District bring dogs to work. Buecksler testified that during his travels throughout the District, he regularly sees dogs in school facilities. While he does not know the circumstances related to why the dogs are in the facilities, it would give the impression to any employee that dogs are not prohibited. Indeed, even the health and safety

supervisor had his dog at his workplace during most of his shift. Other examples were also introduced including those that clearly caused distraction in the workplace.

The District's attempt to distinguish each of the examples raised misses the point. The issue is not whether a particular circumstance is different than the one that arose on September 23, but rather whether an employee knew that dogs were prohibited. Several of the District's witnesses stated that in fact dogs are not prohibited "under certain circumstances" but could not articulate the circumstances and, certainly could not establish that a Support Staff Association member of the District would know what the policy criteria were "under the circumstances." The District's claim that circumstances dictate makes their burden more difficult, not easier. This is an admission that dogs are not prohibited from the workplace, and an admission that circumstances/criteria govern. Yet none of this is communicated to employees and certainly could not have been known to Ratzlaff. Indeed, the District cannot even articulate what the rule is. It depends, they say. But the District used this non-rule to hand Ratzlaff a written reprimand, five-day suspension, and last chance warning.

The District's attempt to infer that Ratzlaff actually did know that what she was doing was wrong is equally specious. The District claims that by not telling her supervisor she was bringing a dog to work and by "hiding" the dog in a classroom, she knew her conduct was inappropriate. In fact, the opposite conclusion is the case. Ratzlaff had no reason to think there was a prohibition and thus did not consider contacting her supervisor particularly since it was after hours and she would not have contacted her supervisor at home under such circumstances. In addition, Ratzlaff was not "hiding" the dog in the classroom, but rather maintaining the dog in an area where it would not disturb nor interfere with anything else in the building during the relatively short period of time that the dog was in the building while others were also in the building (approximately an hour and 15 minutes or less).

Finally, with no other substantive evidence to establish its burden, the District claims that Ratzlaff in fact had been informed through previous disciplinary actions. The District claims that she was put on notice when they informed her that she was not allowed to bring family members to work with her, and that she was informed when told to act professionally and courteously toward her co-workers. These

assertions are ridiculous on their face. The plain meaning of these directives as well as the context in which they were given had nothing to do with bringing a dog to work, something which Ratzlaff understood was acceptable and had done many times previously. In fact, when Ratzlaff was told not to bring any family members to work due in large part to liability issues, she refrained from ever doing so again. Had she understood the notification to establish a prohibition against bringing her dog to work she would certainly have refrained. The District had no such rule or policy and they are now attempting to change the "rules of the game" after the fact.

The District has also failed to establish that Ratzlaff's bringing her dog to work on September 23 was "so clearly wrong" that there was no need to inform her of such a policy or practice. The District states that not every prohibition can be cited in a rule or policy. While this is correct, the "clearly wrong" standard is narrow. The exemplar used to give meaning to "clearly wrong" is the case in which an employer need not have a rule against threatening others with a loaded firearm. Bringing a dog to work comes nowhere near the "clearly wrong" standard. This is particularly the case when dogs in fact are permitted in the workplace by the employer and when Ratzlaff herself had regularly brought her dog to work many previous occasions. The District cannot, in fact, meet the "clearly wrong" standard in this case in light of the fact that "it depends on the circumstances" and those circumstances cannot be specifically articulated even by the District themselves.

The District claims that it has met the "clearly wrong" standard because of a parade of "horribles" resulting from bringing a dog to work. First, if in fact such extensive and serious problems result from bringing a dog to work, the District should certainly have a rule or policy established to prohibit such conduct. If there are exceptions, which might allow, on occasion, an employee to bring a dog to work, those should be established as well. None of that exists, however. The after-the-fact seriousness issues that the District has created apparently do not apply in many circumstances such that "it depends on the circumstances." Indeed, on September 23, none of the serious problems articulated by the District materialized. No mess was made by the dog, no cultural issue arose nor allergic issue arose. In fact, due to Ratzlaff's maintaining the dog in a separate room during the time that other persons were in the facility,

the dog only came in contact with one other person who actually sought the dog out when she was leaving the building. Moreover, despite the District's claim to the contrary, the dog did not interfere whatsoever with Ratzlaff's completing the entirety of her work responsibilities.

There was no deficiency in her cleaning that evening and in fact, her supervisor who met with her the next day testified that the cleaning on September 23 was "adequate." There is no evidence that the building was not clean or that all of Ratzlaff's work responsibilities were not completed on that date.

In sum, there is no evidence, that Ratzlaff's cleaning was affected. There was no discipline nor corrective letter regarding her work performance that evening and, again, the cleaning was "adequate".

An employee cannot possibly be required to know that something is "clearly wrong" when it is routinely allowed within the District, when certain types of dogs (like puppies) are not a problem, and when the employee herself had consistently brought her dog to work previously with knowledge of the District and it was never a problem. This comes nowhere near meeting the "clearly wrong" exemplar of threatening others with a loaded firearm.

The District claims that when Ratzlaff left work on September 24 and "confronted" Linder, asking her "why did you tell Eric about the dog?" she engaged in retaliation, which is misconduct. In fact, the context of this short interaction establishes that the District has failed to meet its burden of showing retaliation.

It is certainly true that Ratzlaff was emotional after Lind indicated that a concern had been raised that she had brought her dog to work the night before and that he would need to meet with her about the concern. By the time Ratzlaff spoke with Linder, she had been crying and she was likely flushed. She said only the one line, "why did you tell Eric about the dog?" and Linder responded with only one line, "I'm not the one that brought the dog in." That is all that was said. That is all that happened. There was no threat. There was nothing physical. There were no gestures or further remarks. There was not a confrontation. Ratzlaff was surprised that Linder would raise an issue about her dog since Linder was playing with the dog (as she admitted) the night before immediately prior to leaving work. Ratzlaff simply did not understand why Linder would raise a concern or a complaint.

The Association strongly disputes that this exchange is retaliation. There is no definition of retaliation written anywhere in the District's policies. Moreover, it is not described with any specificity to any employee including Ratzlaff. It appears that it, once again, is something that an employee is supposed to know, without being told. Most importantly, retaliation is one of those definitional rules that have both black-and-white situations and very gray situations. In other words, there are obvious cases of retaliatory conduct and there are many less obvious cases. At most, this fits the latter category. There is no way for an employee to know. Asking a single question of a co-worker out of curiosity and inquiry, and nothing more, simply does not rise to the level of retaliation warranting discipline. This is particularly the case when the District bears the burden of showing that the employer had clearly articulated the "rules of the game" to the employee. Again, that did not happen as it relates to whether this exchange was misconduct. There can be no finding that she did not satisfactorily complete all of her duties. Thus, it cannot be concluded that the dog interfered with her work performance.

On September 24, after having had a very positive meeting with Lind and Pint regarding her job performance and cleaning work, Ratzlaff was shocked and became emotional when she was told by Lind that he would need to meet with her regarding a "concern" of her bringing her dog to work the night before. Ratzlaff began to cry almost immediately. She did not stop crying for some time and was an emotional wreck. Ratzlaff was in no condition to work the remainder of her shift. Ratzlaff determined that she would use her earned sick leave. She contacted the staff person at the facilities department who handles sick leave and requested a floater stating that she had to leave work. The staff person confirmed coverage for her job. Ratzlaff continued to be in tears when she contacted Lind and told him that she needed to leave work. He responded "OK." While Ratzlaff did not give a specific reason for her leave, it was obvious that she was emotional and in tears and she was given permission to leave. The next day Ratzlaff called in sick and saw the doctor due to excessive bleeding that she was experiencing. Ratzlaff submitted the appropriate sick leave paperwork for Sept 24 and 25.

On September 25, Ratzlaff learned that she was suffering from a serious medical condition which both caused emotional reactions and mood swings as well as requiring serious surgery. Just a few weeks later, Ratzlaff would have a total hysterectomy.

Ratzlaff had every right to use her earned sick leave on September 24 and 25. The District has admitted that they do not request reasons for sick leave nor do they inquire about such information. It is not incumbent upon Ratzlaff to provide such information. The District's claim that Ratzlaff was inappropriately using sick leave is not only wrong but improper. The District has gone so far as to characterize Ratzlaff's use of sick leave as "manipulation". This characterization is reckless. By the time this characterization was made the District knew or should have known that the sick leave use was real and not manipulation.

It cannot be ignored that following the September 30 meeting, Ratzlaff's sick leave request was allowed. The District makes the absurd argument that sick leave with pay may be allowed even though the request is inappropriate. This is not only absurd on its face, it also is inconsistent with the parties' labor contact. The contract states "sick leave with pay shall be allowed by the School Board whenever an employee's absence is found to have been due to illness of the employee or employee's child which prevented the employee's attendance and performance of duties on that day or days." The School Board is to only pay an employee sick leave once they have found that the employee's absence is due to illness which prevents the employee from performing their duties. By approving Ratzlaff's sick leave for September 24 (when she left work) and September 25, the District was explicitly stating that they had found her absence was due to illness and that it prevented her from performing her duties on that day or days. The District cannot now contend that the use of this approved sick leave was misconduct. The District's position in this regard is outrageous and underscores the weakness of their case.

The District appears to claim that Ratzlaff in fact was not suffering from any medical condition or sickness but rather was simply wanting to avoid her supervisor. Again, this makes no sense in light of the fact that she met with him just a few days later than initially planned. In addition, while the District relies on Ratzlaff stating during her meeting with them on September 30 regarding the incident that she left

because she had "had enough", in fact all this means is she was an emotional wreck and could not continue to work that day. Indeed, Ratzlaff informed the District that she was sick when she met with them on September 30.

Finally, while it is unclear, it appears that the District may be arguing that even if the sick leave use was appropriate, it was nonetheless manipulation because it occurred at a time when Ratzlaff's supervisor had, a day earlier, set a meeting with her. This is a ridiculous argument as well. Of course, no one can know when they need to use sick leave. If it interferes with a manager's meeting or other work requirements that does not make it improper. Indeed, this is an earned benefit that may be used when the employee needs to use it. A supervisor's scheduled meeting or other work does not trump use of sick leave.

The District attempts to "gild the lily" by adding in a contention that Ratzlaff engaged in misconduct by excessive cell phone use. Again, this added contention is as improper as it is weak. First, excessive cell phone use is not one of the causes for disciplinary action in the challenged Letter of Deficiency. Interestingly, the District claimed during the second step of the grievance process that this was merely an "oversight." This is not supportable. Even after the District went back and revised the Letter of Deficiency, they did not add cell phone use as one of the causes for disciplinary action. Moreover, Ratzlaff's supervisor, Lind, who signed the Letter of Deficiency, stated that cell phone use was not a cause for disciplinary action.

Lind likely concluded that it was not a "cause" because he had no evidence whatsoever to support the claim other than an off-handed remark from an employee at RCLC regarding cell phone use. Simply put, there is little or no evidence to support a finding of excessive cell phone use and Ratzlaff vigorously denies such accusation. Lind's investigation found just three pieces of information regarding cell phone use.

First, Linder reported that around her break time she opened the door to the ECFE room and "thought she heard a radio or maybe someone on the phone, and then heard someone in the bathroom". This evidence of excessive cell phone use is worthless. Second, Linder reported that at 8:30 when she was

leaving, she looked in the ECFE room and found that Ratzlaff was on her cell phone in the room and stopped talking on the phone a minute to say goodbye to her. This single cell call is insignificant.

Even Lind determined that the cell phone comment from Linder when she was leaving work was not significant enough to include in the Letter of Deficiency. Third, when Lind contacted the RCLC building supervisor regarding whether Ratzlaff had a dog at RCLC on September 23, the supervisor indicated that she had not seen a dog, however, unsolicited, she indicated that Ratzlaff had excessively used her cell phone during the last couple of weeks. No other inquiry or investigation of this allegation regarding RCLC related cell phone use occurred. Ratzlaff has never been confronted with this assertion from RCLC. There are no details. Ratzlaff stated that she usually does not make or take phone calls during work. There is no substantive evidence with any level of particularity to contradict this.

In sum, the addition of cell phone violation is entirely inappropriate in a misconduct case in which the issue was not included as a reason for discipline even upon revision of the disciplinary document. In any event, the District has not established excessive cell phone use in this case.

The District also attempts to assert that Ratzlaff was not doing her job the night of September 23 and that was additional cause for her discipline. This is not stated anywhere in the "causes for disciplinary action" in the Letter of Deficiency. This add-on is inappropriate.

In any event, the District has failed to establish that Ratzlaff did not perform her work on September 23. Other than Linder's testimony, all of the evidence indicates that Ratzlaff did perform her work on September 23. Even Lind testified that there were no cleaning issues from September 23 and that the work was done "adequately." As for Linder's testimony, it can only be described as overzealous. It appeared that Linder truly wanted to help her employer against Ratzlaff. Linder went so far as to characterize Ratzlaff as "suicidal." Linder stated that she had to "walk on eggshells" when she was around Ratzlaff. Her testimony appeared exaggerated. In particular, Linder testified to a number of specific details during the hearing (months after September 24, 2014) well beyond what she had informed Lind of the day immediately following the incident of September 23. A comparison of her testimony and Lind's notes of how she described what had occurred on September 23 and September 24 is instructive.

In addition, Linder testified that she was very certain that Ratzlaff was not doing her cleaning duties while Linder was in the building. This testimony despite the fact that Linder had to agree that she could not have known this other than by what she heard and observed from the cleaning cart. Linder was not following Ratzlaff around, nor did she see what Ratzlaff was doing in the ECFE room, nor did she inspect whether the building had been cleaned either that night or the next day. Relying on Linder's testimony of Ratzlaff's cleaning that night or their interaction the next day is simply misplaced reliance and it belies the results of the work done by Ratzlaff that night.

The District spent hours, into days, on the past history record of Ratzlaff. This is not a remedy case. This is a case challenging the District's claim of misconduct. Prior discipline cannot be used to establish the misconduct that the District is charging in this case. Past history is not relevant other than to show that Ratzlaff had been put on notice regarding her conduct. In fact, the prior incidents are also not relevant to notice. As already discussed, none of the work history evidence relates to bringing a dog to work, or the use of sick leave (other than the July incident as previously addressed.) In addition, none of the work history gives any definition to retaliation nor is instructive regarding the propriety of Ratzlaff's inquiry of Linder. It appears this evidence has been introduced merely to prejudice the Arbitrator against Ratzlaff.

The Association requests that the Arbitrator sustain the grievance in its entirety finding that Ratzlaff did not engage in misconduct with respect to any of the three issues identified in the Letter of Deficiency. The Association requests that the Letter of Deficiency and its amendment and all references thereto be removed from Ratzlaff's file and that she receive reimbursement at her regular hourly rate for time lost as a result of the five-day suspension and that she otherwise be made whole in all respects.

DISCUSSION

It is undisputed that Ratzlaff has a number of corrective actions and disciplinary actions on her employment record over the last few years, although from January 2013 through May 2014 there are no disciplinary or corrective actions on her record. The doctrine of progressive discipline generally allows

an employer to impose more severe discipline with the next similar misconduct. However, the employer must demonstrate there was the appropriate level of misconduct to support the progressive discipline at the next step. It is therefore necessary to review the three reasons[i] for disciplining Ratzlaff for her conduct September 23, 2014 through September 25, 2014 that are outlined in the October 2, 2014 "Notice of Discipline and Suspension" and the November 6, 2014 amended "Notice of Discipline and Suspension" to determine whether there was a basis for discipline and the level of discipline that was issued. Each will be reviewed in turn.

1) DOG AT WORK

Turning to the first basis for discipline, the "Notice of Discipline and Suspension," states:

> Bringing a pet to work with you and keeping it in a district building and on district property for several hours during work shift is not acceptable for a multitude of reasons including compromising the sanitation of the building and playground, distracting staff and students, detracting from work time and being offensive in the culture of some of our students.

On the evening of September 24, 2014 Ratzlaff took her dog to work with her at CVLC and kept it in the children's room.

The District presented a number of reasons why it is not appropriate to take a dog into a District building and on District property. These include Somali American that are afraid of dogs, sanitation and hygiene issues, distraction from work, liability and safety, among others. The District's reasons are all possible reasonable bases to support such a rule prohibiting taking dogs to work; however, it is noted that there is no verbal or written policy against the practice. Further analysis is therefore required.

Ratzlaff testified credibly without contradiction that when she worked at Red Pines Elementary School from 1994 to 1999 she regularly took her dog to work, and it accompanied her on her custodial tasks. The Building Manager at the school would do the same. The District responds, however, that was several years ago and practices have changed. However, Ratzlaff credibly testified that she was unaware of any such changes.

In response to the Union's witnesses' examples of relatives of employees who brought a dog in to show school employees, the District states the prohibition does not apply to non-employees. Yet, some of

the reasons should apply, such as safety and liability risks or the possibility that a Somali American student or parent might be in close proximity.

The District argues that other examples where the dog was caged while in a District building are distinguishable; however, if a Somali American student or parent was close by, the same concern would also exist. It is also worth noting that the average person would not likely know that Somali Americans have a fear of dogs.

Buecksler credibly testified that he witnessed an employee named Heather who brought her dog into the Annex to show her co-employees. Buecksler is also aware of other times when dogs were at buildings and on some occasions their droppings had to be disposed of. O'Shaughnessy also gave examples where he had seen a dog in a District building. Such examples of dogs in the District's buildings as testified to by Buecksler and O'Shaughnessy also run contrary to some of the reasons the District proffers as to why dogs should not be allowed. For example, a Somali American student or parent could be in the building at the time and safety and liability concerns could also apply.

The District further argues that the dog distracted Ratzlaff from her work. That would also have been the case in the past when she was at Red Pines Elementary, yet she was allowed to have her dog in the school with her while she worked. As noted above, Ratzlaff was not aware of any change in practice by the District with regard to taking dogs to work. In addition, Lindner's testimony about whether Ratzlaff completed her cleaning tasks the night of September 23, 2014 is inconclusive and inferential. Lindner did not observe Ratzlaff the entire time that Linder contends Ratzlaff was in the children's room. I therefore find there is no credible, objective evidence that Ratzlaff was unable to complete her tasks that night because her dog was in the children's room.

I am also not persuaded that, as the District asserts, previously warning Ratzlaff that she should not take family members to work sufficed to warn her not to take a dog to work. There are obvious, stark differences between a child and a dog.

As has been stated in Elkouri and Elkouri, How Arbitration Works, (6th ed., 2003) at p. 990:

> One of the … most commonly recognized principles in the arbitration of discipline

> cases is that there must be reasonable rules or standards , consistently applied and enforced and widely disseminated.
>
> Concerning notice of rules, one arbitrator stated: "an employee can hardly be expected to abide by the 'rules of the game' if the employer has not communicated those rules, and it is unrealistic to think that , after the fact, an arbitrator will uphold a penalty for conduct that an employee did not know was prohibited." (citation omitted)

Such are the circumstances here. I find there was not just cause for disciplining Ratzlaff for taking her dog to work the evening of September 23, 2015.

2) CONFRONTING LINDER

Turning to the second basis for the discipline, the "Notice of Discipline and Suspension," states:

> Questioning a staff member about why she shared with her supervisor that you brought a dog into the building is unacceptable, unprofessional and considered retaliatory behavior.

On September 24, 2015 after Lind advised Ratzlaff that there needed to be a meeting about taking her dog to work the evening before, Ratzlaff then went to talk to Lindner. Ratzlaff and Linder testified that Ratzlaff asked Lindner, "Why did you tell Eric about the dog?" Lindner responded "You're the one that brought that stupid dog." Habek who was relatively close by testified that Ratzlaff also said "I thought you were my friend." Ratzlaff then left the area. Because Linder and Ratzlaff were in agreement as to what specifically was said and Habek was a bit of a distance away, I am crediting Linder's and Ratzlaff's description of what was stated.

There is some difference between those three witnesses in describing how angry or upset Ratzlaff was at that time. Ratzlaff testified she was upset and crying but not angry. Linder testified that Ratzlaff was angry, while Habek testified Ratzlaff had a slightly angry tone. A reasonable interpretation of the evidence indicates that Ratzlaff came across as somewhat angry or upset.

The District also included that, as part of the reason for the discipline, Ratzlaff engaged in retaliatory behavior toward Linder during the interaction. Most dictionaries define retaliatory behavior as the act of harming someone because he or she has been harmed by that person, i.e., revenge. That conversation by Ratzlaff toward Lindner included no action by Ratzlaff to attempt to harm Lindner. She

simply asked Lindner why she told Lind about the dog the night before. Ratzlaff did not engage in retaliation with that verbal exchange.

I do not find that Ratzlaff's interaction with Lindner on September 24th was a sufficient basis for a five-day suspension. However, because Ratzlaff had received notifications in the past few years that she should be more professional and courteous with fellow employees (including a written reprimand on June 11, 2014 in part for "being disrespectful and unprofessional … with … building staff"), I find that her exchange with Linder on September 24th is a sufficient basis for a one-day suspension.

3) LEAVE

With respect to the third basis for discipline, the "Notice of Discipline and Suspension," states:

> Electing to leave work and use sick leave after a supervisor brought an issue to your attention is not acceptable conduct or attendance. Discussing your job performance, conduct at work and attendance with your supervisors is a requirement of your employment with the District.

The evidence reflects that shortly after Lind met with Ratzlaff on the afternoon of September 24th Ratzlaff notified the appropriate District staff member that someone needed to fill in for her for the rest of her shift that day, and Ratzlaff then called Lind to tell him that she had to leave. It is undisputed she was crying at the time. Lind responded "OK" when Ratzlaff said she was leaving. She was then off the remainder of her shift on the 24th and all of the 25th. On September 29th Lind signed her leave request form for sick leave during that time she was off.

Lind testified that he had scheduled the meeting with Ratzlaff about the dog for September 25th. Lind further testified that she told Ratzlaff about the date of the meeting, although Ratzlaff testified that she was not told when the meeting would occur. That meeting was rescheduled and took place on September 30th.

The manner by which Ratzlaff left work on the 24th and then took sick leave the 24th and the 25th resulted in the third basis for discipline. This reason for discipline also must be reviewed. Here, Lind told Ratzlaff "OK" when she told him on the telephone that she had to leave work and then on September 29th signed off on her sick leave. If an employer later finds that an employee fraudulently took sick leave,

such as attending a ball game when claiming to be sick, the employer clearly has a basis for rescinding the approval of the leave and disciplining that employee.

However, the additional information the District received more fully supports Ratzlaff's reason for leave. At the grievance meetings, the District was advised that on September 24th Ratzlaff left work because of mental stress/duress. Lind's own notes of the telephone conversation reflect that Ratzlaff was crying at the time. On September 25th Ratzlaff was also off of work. At the grievance meetings the District was advised Ratzlaff took off September 25th because she was suffering from a longstanding medical condition and she went to a clinic that day. The District simply disregarded those assertions. At the hearing it became clear that the medical condition resulted in her undergoing a hysterectomy a few weeks thereafter. It is reasonable to find that such a medical condition also would have caused an emotional strain that required her to leave work on September 24th; moreover, the record reflects that Ratzlaff was seen at a medical clinic the next day.

When: 1) Ratzlaff told Lind that she must leave work to which Lind responded "OK," and memorialized that she was crying at the time 2) Lind then signed off on the sick leave, and 3) the District was thereafter advised that Ratzlaff left work on September 24th because of mental stress/duress and had a medical condition at the time (as supported by medical records), it is hard to understand why Ratzlaff would then be disciplined for leaving work for emotional distress (when she was crying) and thereafter taking sick leave. I therefore find there was not just cause for Ratzlaff to be disciplined for leaving work on September 24, 2014 and taking sick leave on September 24 and 25, 2014.

In conclusion, I find that there was not just cause for disciplining Ratzlaff for: 1) taking her dog to work the evening of September 24, 2014, and 2) leaving work on September 24, 2014, and taking sick leave on September 24 and 25, 2014. I further find there was not just cause for a five-day suspension for Ratzlaff confronting Linder on September 24, 2014; however, there was just cause for a one-day suspension for that interaction.

The District shall remove the October 2, 2014 "Notice of Deficiency and Suspension" and November 6, 2014 amended "Notice of Deficiency and Suspension" from Ratzlaff's personnel file. In its

place a one-day suspension for confronting Linder on September 24, 2014 shall be substituted. Four days of the five-day suspension shall be rescinded and Ratzlaff shall be made whole for those four days of suspension.

In light of the foregoing, it is my

AWARD

1) That there was not just cause for Cheryl Ratzlaff to receive a five-day suspension;

2) That four days of the five-day suspension shall be rescinded and Cheryl Ratzlaff shall be made whole for those four days;

3) That the District shall remove the October 2, 2014 "Notice of Deficiency and Suspension" and November 6, 2014 amended "Notice of Deficiency and Suspension" from Cheryl Ratzlaff's personnel file;

4) That there was just cause for Cheryl Ratzlaff to receive a one-day suspension for her confrontation with Linder on September 24, 2014, which shall replace the five-day suspension.

Dated in Madison, Wisconsin, on June 19, 2015, by

_____

Andrew M. Roberts

[i] There was some evidence and testimony presented by the District with respect to Ratzlaff's cell phone use the evening of September 23, 2014. However, as the Association notes, that is not included as one of the three bases for discipline in the November 6, 2014 "Notice of Discipline and Suspension," even after taking the opportunity to correct the earlier October 2, 2014 "Notice of Discipline and Suspension." Ratzlaff's cell phone usage on September 23, 2014 will therefore not be considered as one of the reasons for disciplining her.